

EXHIBIT F

TO DECLARATION OF SARA M. BERRY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Patti Jo Cahoo, et al.,

Plaintiff,

Case No. 17-10657

-v-

SAS Institute, Inc., et al.,

Defendant.

MOTION TO QUASH

BEFORE THE HONORABLE DAVID M. LAWSON

United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
February 6, 2019

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1 Detroit, Michigan

2 February 6, 2019

3 2:16 p.m.

4 * * *

5 THE CLERK: All rise. The United States District
6 Court for the Eastern District of Michigan is now in session,
7 the Honorable David M. Lawson presiding.

8 THE COURT: You may be seated.

9 THE CLERK: Now calling the case of Patti Jo Cahoo
10 and others versus SAS and others, Case Number 17-10657.

11 THE COURT: Good afternoon, Counsel. Would you put
12 your appearances on the record, please?

13 MS. HUSBAND: Shannon Husband, Assistant Attorney
14 General, on behalf of non-party Michigan Unemployment
15 Insurance Agency.

16 THE COURT: I'm sorry, your name again?

17 MS. HUSBAND: Shannon Husband, like husband and wife.

18 THE COURT: You represent who?

19 MS. HUSBAND: The non-party, Michigan Unemployment
20 Insurance Agency, the movant.

21 THE COURT: Oh, it's your motion?

22 MS. HUSBAND: Yes.

23 THE COURT: Right. Okay.

24 MR. ROSENFELD: Good afternoon, your Honor. Stephen
25 Rosenfeld and Tim Lowe on behalf of Defendant CSG.

1 MR. STIDHAM: Erik Stidham, your Honor, on behalf of
2 Defendant Fast Enterprises.

3 MR. PARIS: Tony Paris, your Honor, on behalf of the
4 Plaintiffs.

5 THE COURT: All right. The motion is to quash a
6 subpoena for two categories of information. One is the
7 documents relating to the named plaintiffs and the other
8 individuals who are not named plaintiffs but are the claimants
9 listed in the plaintiffs' initial disclosures.

10 And the second category is communications and
11 documents related to the project that were transmitted to the
12 Auditor General.

13 Are you seeking to quash the subpoena with respect to
14 both categories?

15 MS. HUSBAND: No, your Honor. We're only moving to
16 quash the subpoena as it relates to the individuals, not
17 the --

18 THE COURT: All right. That would be the first
19 category?

20 MS. HUSBAND: Yes.

21 THE COURT: All right. Have you complied with the
22 subpoena with respect to the second category yet?

23 MS. HUSBAND: We have not. There has -- we're still
24 trying to -- I guess one of the things we wanted to talk to
25 the Court about is the issue of costs.

1 THE COURT: On that subpoena?

2 MS. HUSBAND: Yes. Yes. It was nominal, your Honor,
3 but there were costs.

4 THE COURT: All right. Is there some reason why you
5 haven't produced them and then taken up the issue of costs?

6 MS. HUSBAND: Well, it was my understanding, your
7 Honor, that we -- it's our position that we shouldn't be
8 required to produce the documents unless costs are paid ahead
9 of time. That's in the CFR.

10 And, also, it was my understanding that if there was
11 an issue with respect to costs after a bill was produced that
12 the parties would have an opportunity to discuss that with the
13 Court.

14 THE COURT: Well, maybe we're putting the cart before
15 the horse, but is not the CFR directed to information that
16 pertains to individual claimants?

17 MS. HUSBAND: Correct. And there is also information
18 in those files that would pertain also to employers.

19 THE COURT: And that's with respect to the second
20 category?

21 MS. HUSBAND: No. You're correct, your Honor.

22 THE COURT: So where do the costs come in?

23 MS. HUSBAND: The costs for the production. Well,
24 we're a non-party, your Honor, so our first position is that
25 as a non-party we're not required to continue to produce

1 documents without some discussion with respect to whether the
2 parties are going to share the costs of producing the
3 documents.

4 THE COURT: And where does that come from?

5 MS. HUSBAND: Well, your Honor, the -- I believe that
6 Federal Rule 45 talks about cost sharing, and it was also in
7 the case that I cited in my motion, the In Re: Modern Plastics
8 Corp. That was a case that talked about cost sharing where a
9 party is not -- where a producer of information is not a party
10 to the litigation and whether cost sharing is appropriate and
11 how it can be resolved.

12 THE COURT: My initial question, maybe I posed it
13 wrong, is whether you were seeking to quash the subpoena with
14 respect to the second category, and I thought you answered no.

15 MS. HUSBAND: Correct.

16 THE COURT: All right. If that's the case, then
17 Rule 45 requires the producing party to bear costs unless you
18 seek a protective order under Rule 45, which you just told me
19 you weren't doing.

20 MS. HUSBAND: That's correct, your Honor.

21 THE COURT: So produce the items.

22 MS. HUSBAND: Yes, your Honor.

23 THE COURT: All right. Now, with respect to the
24 others, have you been in touch with the plaintiffs' lawyer in
25 this case?

1 MS. HUSBAND: The plaintiffs' lawyer, no. I have not
2 heard from them.

3 THE COURT: All right. There was a discussion -- the
4 reason I ask is because you weren't present, your colleagues
5 in the office were present, but I think you're not talking to
6 each other; right?

7 MS. HUSBAND: We're not supposed to be, right.
8 Correct.

9 THE COURT: There was a discussion at a status
10 conference that indicated that the plaintiff was going to
11 consent to the production of these documents on behalf of the
12 individuals named in the subpoena, which would basically
13 trigger one of the exceptions in the regulation. Has that
14 conversation not taken place?

15 MS. HUSBAND: Your Honor, I have not heard from
16 plaintiffs' counsel myself. I can't speak to the other State
17 defendants. I haven't heard from plaintiffs' counsel with
18 respect to whether or not they will consent to the release of
19 the documents.

20 THE COURT: Is that -- wouldn't that take care of
21 everything except for the cost issue?

22 MS. HUSBAND: I don't think it would take care of
23 everything, because I don't think that the CFR requires that
24 they consent. There is no language in the CFR that says that
25 we can produce the records if they are willing to consent to

1 the records.

2 THE COURT: All right. Go ahead and make your
3 argument, then.

4 MS. HUSBAND: Well, your Honor, as we -- as I
5 previously indicated, the agency was required under 20 CFR
6 630.7 to file this motion to quash because the other
7 defendants are seeking information related to the claimant
8 files. Those are five parties and six individuals who are
9 not parties to the litigation.

10 Specifically, they are seeking all communication
11 and documents related to the plaintiffs that the agency has
12 related to unemployment claims, adjudications, appeals, and
13 readjudications.

14 We indicated in the beginning of our argument that
15 State law precludes the release of that information, but more
16 specifically, Federal regulations require the agency to file a
17 motion to quash to disclose -- to avoid disclosure of the
18 information.

19 THE COURT: Well, State law would not be an obstacle
20 to an order from this Court; is that correct?

21 MS. HUSBAND: I understand that's the Court's
22 position. Yes, your Honor. That's correct.

23 THE COURT: Okay. Well, do you agree?

24 MS. HUSBAND: I -- I agree with that.

25 THE COURT: Okay. Fine. So we're basically dealing

1 with the Federal regulation; right?

2 MS. HUSBAND: Yes, your Honor, we are dealing with
3 the Federal regulation. There two exceptions that allow the
4 agency to avoid filing a motion to quash. That is whether
5 there has been previously issued a binding precedential
6 decision that requires disclosure or whether there is a
7 well-established pattern of court decisions regarding
8 disclosure.

9 As we have indicated, we have not heard from the
10 plaintiffs. They have not consented to the disclosure of the
11 information. And it's also our position that there is no
12 well-established pattern of prior court decisions in the
13 Eastern District or in the State of Michigan at all in the
14 Federal Courts with respect to the disclosure of unemployment
15 information.

16 THE COURT: Well, the rule doesn't limit the view of
17 precedential decisions or establishing a pattern to a single
18 district, does it?

19 MS. HUSBAND: It doesn't. But I don't know that it
20 is wide enough that it would apply to any court. For example,
21 if Hawaii Federal Courts found that the information would be
22 -- could be disclosed, I don't know if that would apply to the
23 Eastern District of Michigan or that would be considered
24 prior -- a prior decision.

25 THE COURT: Well, if there is an array of decisions

1 from Federal District Courts across the nation that pretty
2 much favor disclosure, that's something that I need to pay
3 attention to, isn't it?

4 MS. HUSBAND: Yes. Yes, your Honor, it is. But,
5 again, we're asking that this Court take an independent look
6 at the matter as well as the CFR and reach its own conclusion.

7 There is one case from the Southern District of Ohio
8 that specifically dealt with 20 CFR, and in that court, in
9 that case, the Easter versus Beacon Tri-State Staffing case,
10 that Court determined that disclosure was proper.

11 THE COURT: That was an employment case, wasn't it?

12 MS. HUSBAND: It was an employment case, that's
13 correct.

14 THE COURT: I mean, not an unemployment case.

15 MS. HUSBAND: Yes.

16 THE COURT: It was a -- I think the plaintiff wanted
17 those records to rebut a claim by the defendant in a -- was it
18 an FLSA case or something?

19 MS. HUSBAND: FMLA case.

20 THE COURT: FMLA case, is what it was. Okay.

21 MS. HUSBAND: And the District Court in that case did
22 deny the Ohio Unemployment Insurance Agency's motion to quash.
23 First, the Court found that there were no privacy concerns
24 because the individual in that case did not object to the
25 release of the information and, again, as we discussed, that

1 has not occurred in this case.

2 And also because there was a well-established
3 precedent in the Southern District of Ohio for the disclosure
4 of information.

5 If the Court does not believe that CFR prohibits
6 the agency -- if this Court does not believe that the
7 CFR prohibits the disclosure of the information, in the
8 alternative, we would argue under Rule 45(d)(3)(A)(iii) that
9 the motion should be -- or the subpoena should be quashed or
10 should be narrowed more specifically because it's overly
11 burdensome to the Unemployment Insurance Agency.

12 With respect to --

13 THE COURT: Well, with respect to production, sort
14 of jumping around a little bit, you filed an affidavit with
15 respect to costs and the number of hours it would take to
16 produce the items. And may I assume that the estimate that
17 you gave is to basically fully comply with the subpoena?

18 MS. HUSBAND: Yes. That's for all eleven claimants
19 as well as the second portion, the Auditor General.

20 THE COURT: All right. And then when I evaluate the
21 undue burden argument I have to do that basically in light of
22 the new -- relatively new scope of discovery provisions in
23 Rule 26(b)(1); is that correct?

24 In other words, I have to employ the proportionality
25 analysis; right?

1 MS. HUSBAND: That's correct, your Honor.

2 THE COURT: Okay.

3 MS. HUSBAND: But one of the things -- first of all,
4 we object to the requirement that we need to disclose the
5 files for all eleven. We feel that it would be more
6 reasonable to start with the five individual named plaintiffs.
7 There has not been -- this Court has not, when I checked the
8 docket, certified the class. These individuals are -- they
9 have been identified in initial disclosures, but they are not
10 parties.

11 Also, your Honor, we would like some sort of
12 fashioning, if the Court is inclined to permit disclosure, of
13 a narrowing of the issue. For example, they are asking for
14 records going back to 2012. Each individual claimant could
15 have filed multiple claims that are unrelated to the issues
16 that are before the Court, and that specifically is the fraud
17 adjudication.

18 Just to give an example, you could have Claimant A
19 who has filed four or five claims since 2012, and it's the
20 agency's position that having to bear the burden and the cost
21 of producing records that are not relevant to the underlying
22 matters of this case is unduly burdensome to the agency.

23 THE COURT: Anything else?

24 MS. HUSBAND: No.

25 THE COURT: I do have a question for you. The costs

1 that you estimated had to do with producing the data in
2 encrypted format. Why would we be doing that?

3 MS. HUSBAND: Well, that would just be the method of
4 getting the information to the individuals. So whether --

5 THE COURT: Well, couldn't you just put it in native
6 format on a thumb drive and give it to them?

7 MS. HUSBAND: We could do that. There wasn't a big
8 cost difference between the two. It's a matter of, do they
9 want to receive it via e-mail, an encrypted e-mail, because
10 there's confidential information --

11 THE COURT: Oh, I see. Okay.

12 MS. HUSBAND: -- or whether or not they want it on a
13 thumb drive.

14 But I just wanted the Court to understand that the
15 way that the MiDAS system is set up, the agency has to do a
16 screen print of each page, then they have to print it, and
17 then they have to scan it into a PDF format. So that's --

18 THE COURT: Oh, I suppose you could skip a step and
19 just give them the printouts; right?

20 MS. HUSBAND: I mean, we could skip a step and give
21 them the printouts, but that goes into how long it takes to
22 produce the files, because they have to go into -- as it
23 stands now, if they are allowed to have all information on all
24 claims, they have to find each individual, whether it's five
25 or six, go through each of their claims, and there's tabs for

1 every single claim. Then they have to go to each tab, print
2 every single piece of paper. So, yes, we can produce it, but
3 it is voluminous. It does take a significant amount of time,
4 and that is where the significant amount of cost is.

5 THE COURT: I hear you on that. I'm just thinking to
6 reduce the cost and reduce the labor, once you have it in
7 printed form you could produce that without having to scan it
8 and then redigitize it, if you will. Could you do that?

9 MS. HUSBAND: That would cut down on the cost, your
10 Honor. There would also be -- I know that I did read the
11 protective order that the Court issued and the provision that
12 said that the agency's records would be confidential. I guess
13 my question would be whether or not the information such as
14 Social Security numbers or Federal ID numbers would have to be
15 redacted or if that information would be produced unredacted.

16 THE COURT: Well, I'm sure it could be produced
17 unredacted. If it had to be filed, it would have to be
18 redacted under the e-Government Act.

19 MS. HUSBAND: So that would also -- if the agency
20 doesn't have to go back and redact personal information, then
21 that would also cut down on the costs.

22 THE COURT: Yeah. Okay. All right. Any further
23 argument, Ms. Husband?

24 MS. HUSBAND: No.

25 THE COURT: All right. Thank you.

1 Mr. Rosenfeld, are you leading off with this?

2 MR. ROSENFELD: I am, your Honor. Then Mr. Stidham
3 is also going to make a few comments, if necessary.

4 THE COURT: Address the consent issue, if you would.

5 MR. ROSENFELD: Yeah. Your Honor, as you may recall,
6 at the last status conference plaintiffs indicated that they
7 would consent, that they had no issue.

8 THE COURT: Not only do I recall, but I think I just
9 mentioned that.

10 MR. ROSENFELD: Right. Right. Right. Yes. I
11 apologize, your Honor.

12 THE COURT: All right.

13 MR. ROSENFELD: So I believe that goes to exactly --
14 as your Honor mentioned, it reduces any privacy concern that
15 the Court would have to deal with.

16 Another thing that addresses that privacy concern is
17 the protective order in this place -- I mean, in this case.
18 We have -- we have a two-stage protective order here where we
19 can designate things confidential or we can even designate
20 things attorney's eyes only. So we really don't see any
21 privacy concern here.

22 And under the Regulation 603 --

23 THE COURT: Well, there would be privacy concerns if
24 documents were floating around that had Social Security
25 numbers and other personal identification information.

1 MR. ROSENFELD: Well, no, there -- there are privacy
2 concerns, but there are not privacy concerns if those
3 documents are produced pursuant to a protective order that has
4 been signed on by the parties in this case and it's been
5 signed on by anyone who would receive such information.

6 And under 603.7, I think one piece of the puzzle that
7 the State missed is that if there are methods of avoiding the
8 disclosure of confidential information like there are in this
9 case, they are not even required to file a motion to quash.
10 603.7(a) says that the State or State agency must file and
11 diligently pursue a motion to quash if other means of avoiding
12 the disclosure of confidential UC information are not
13 successful or if the Court has not already ruled on the
14 disclosure.

15 Here, we have a method for protecting that
16 information; as I mentioned, the protective order.

17 THE COURT: Well, all right. I appreciate your
18 argument, and that you have dwelled on that a little bit in
19 the briefs as to whether the State was required to do that.
20 The fact is that they have.

21 MR. ROSENFELD: Sure.

22 THE COURT: So we have got the motion. Now we have
23 to deal with it.

24 MR. ROSENFELD: Right.

25 THE COURT: So whether they had to or maybe even if

1 they didn't but chose to do so out of an abundance of caution,
2 here we are.

3 MR. ROSENFELD: I understand, your Honor.

4 THE COURT: All right.

5 MR. ROSENFELD: So if you look at the exceptions
6 that 603.7 have, the one exception is if there is a
7 well-established pattern of prior court decisions, as the
8 Court mentioned a few minutes ago.

9 The Easter case which we have cited in our brief
10 and which was mentioned in the initial argument of counsel
11 recognizes that there is a well-established pattern.

12 Now, while that decision is certainly not binding on
13 this Court, as it is an Ohio decision, the plaintiffs have not
14 set -- or excuse me -- the movant here, the State, has not set
15 forth any case that says the opposite.

16 The Easter case goes through and recognizes various
17 other courts that have allowed production in cases like this.
18 And I'm not aware of, and the movant hasn't set forth, any
19 case in the Sixth Circuit which says differently, which
20 says that in this type of a situation there are -- it is
21 inappropriate under 603.7 to order the production of such
22 documents. And here --

23 THE COURT: Well, we agree that there is no Circuit
24 law on this; right?

25 MR. ROSENFELD: Right.

1 THE COURT: Either published or unpublished?

2 MR. ROSENFELD: That's correct, your Honor.

3 THE COURT: We do agree that there are various
4 District Courts around the country which have ruled with
5 respect to this regulation; correct?

6 MR. ROSENFELD: That is correct.

7 THE COURT: Some which the parties cited and some
8 that you haven't.

9 MR. ROSENFELD: That's correct.

10 THE COURT: And do you -- are you able to represent
11 what you believe to be the general trend or thrust of those
12 decisions, if a pattern can be discerned?

13 MR. ROSENFELD: Your Honor, the ones that we have
14 reviewed, and I can't say I have read every single case around
15 the country on this, but I have read a lot of them, and we
16 believe -- it is our position that the trend and that the
17 pattern there is as the Easter case sets forth. The pattern
18 is towards production, particularly in cases like this where,
19 if you look at the -- as you mentioned, the standard for
20 production or proportionality standard, where the information
21 here is so highly relevant. We are seeking information of the
22 plaintiffs that is at the crux of their due process claims and
23 of their other constitutional claims. They are -- they are
24 stating that they were robo adjudicated and that those robo
25 adjudications were improper.

1 Well, for us to be able to defend that and, frankly,
2 for them to be able to assert that in the first place, we
3 need the information that they provided to the State agency.
4 We need to evaluate whether or not those alleged robo
5 adjudications were proper or improper. You -- there is no way
6 to prosecute this case without that information. That's how
7 relevant --

8 THE COURT: This is -- as you're saying, these are
9 basically the corpus delicti?

10 MR. ROSENFELD: That's exactly right.

11 THE COURT: To borrow a phrase.

12 MR. ROSENFELD: Yes.

13 THE COURT: All right.

14 MR. ROSENFELD: So I would like to move for a moment,
15 unless the Court has any questions on that part, into the
16 burden and cost issue that the State raised.

17 And it's interesting that the State is raising undue
18 burden. They put forth a declaration that says that the total
19 production is going to be 8,800 pages for all of the -- this
20 is the subpoena and response that's in paragraph 23 of their
21 declaration. This case, as I'm sure the Court can appreciate,
22 is going to involve probably millions of pages of documents.
23 A production of 8,800 pages by a State agency where a number
24 of those were -- a number of individuals who worked for those
25 State agencies are employed -- are parties here, I think --

1 THE COURT: Well, we don't even have to talk about
2 page length. They have estimated, at the outside, I would
3 presume, giving themselves the benefit of the doubt, that the
4 total production cost is going to be about \$16,000 or \$17,000.
5 Isn't that how you read that?

6 MR. ROSENFELD: I think -- I thought it was going to
7 be about \$8,000. I didn't know --

8 THE COURT: Well, I thought there were two batches.
9 Can you clarify?

10 MS. HUSBAND: Yes, your Honor. It's basically
11 \$8,000. We just gave them two avenues of getting them the
12 documents, if they wanted an e-mail or a thumb drive.

13 THE COURT: I get it. Okay. Thank you.

14 MR. ROSENFELD: So -- and even that, your Honor --

15 THE COURT: I was adding them up.

16 MR. ROSENFELD: Right. I appreciate that.

17 So the method of production that the State talked
18 about and that would cost this \$8,000 was taking screenshots
19 of pages of the terminal.

20 First of all, we don't think that that's how it
21 should be produced. We think it should be produced, as the
22 Court mentioned, in native format. These are documents and
23 this is information within a database. This information can
24 be extracted from that database with a query. And you
25 could -- you could take all of this information, extract it

1 with a simple query and import it to an electronic file.
2 There is no need to print it out. There is -- there is no
3 need to then print it and scan it. All you need is one query
4 to get it to a -- from one database to another database file.

5 And that way, frankly, it's not only cheaper for the
6 State, but it's more useful for the parties, because with the
7 electronic discovery software like a Relativity, we would then
8 have a lot more meta data about that, about that information.

9 So we --

10 THE COURT: What good would the meta data do you in
11 this particular situation?

12 MR. ROSENFELD: Well, the -- the meta data here would
13 be -- instead of having to print it out and scanned in OCR, we
14 would then have the full text. So there wouldn't be meta data
15 like there is on an e-mail where you would have, you know, all
16 received dates, but we would have the full text and the
17 section from which that full text came from without having to
18 then do, you know, an OCR of any printed-out screenshot, which
19 we would have to do if -- you know, if we got it in that
20 format.

21 THE COURT: All right.

22 MR. ROSENFELD: So --

23 THE COURT: I can hear the can opener peeling off the
24 top of that can of worms here.

25 MR. ROSENFELD: How so, your Honor?

1 THE COURT: Well, Ms. Husband, do you mind if I ask
2 if you are an IT person?

3 MS. HUSBAND: I don't mind if you ask, your Honor.
4 And I am not an IT person.

5 THE COURT: All right. So would you feel
6 uncomfortable having a discussion about mode of production
7 without consulting with your IT person?

8 MS. HUSBAND: Yes, I would.

9 THE COURT: All right. So that's not going to be
10 resolved today.

11 MR. ROSENFELD: Okay.

12 THE COURT: Thank you.

13 MR. ROSENFELD: Well, so we can talk about the mode
14 of production, but at the very most, even if they had to
15 produce it in paper format, as they have suggested, and even
16 if it will take them, you know, 13 hours to review each 800
17 pages, which, you know, frankly, I don't know why they would
18 need to review it, because as the Court mentioned, there is a
19 protective order, they don't need to redact Social Security
20 numbers, all they need to do is get the information off their
21 system and produce it.

22 If they want to review it for their internal
23 purposes, you know, that should be at their cost. The parties
24 should not have to bear that cost, because I don't think that
25 there is any reason, any privacy reason for them to review it

1 because of the protective order in place in this case.

2 And one other thing I would mention. Maybe this is
3 more apt during the status conference portion of this, but
4 even if the parties would have to bear some costs, and even
5 if, say, that the Court ruled that the \$8,000 was an
6 appropriate cost, which, again, we don't agree with, I think
7 that that cost would have to be borne equally by the
8 plaintiffs and the defendants in this case, not just by the
9 party that issued the subpoena, of course, should the
10 plaintiffs want the information. So that's -- that's another
11 issue that --

12 THE COURT: All right. No, you made that clear in
13 your papers.

14 MR. ROSENFELD: Right.

15 THE COURT: Anything else then?

16 MR. ROSENFELD: That's -- that's it. Do you have
17 anything?

18 THE COURT: Well, Mr. Stidham, are you presenting an
19 argument? You didn't check off your --

20 MR. STIDHAM: If I failed to, your Honor, I'm sorry,
21 that's a mistake by me. And I only have a few comments I
22 might add.

23 THE COURT: Fire away.

24 I'm sorry. Mr. Rosenfeld, were you finished?

25 MR. ROSENFELD: I am, your Honor.

1 THE COURT: Okay. Great.

2 MR. STIDHAM: And, your Honor, I will be brief.

3 We -- Fast is aligned with CSG's arguments and the arguments
4 that Mr. Rosenfeld has made today.

5 I do want to raise just a couple of other issues,
6 some of which, to be candid, your Honor, might bleed into what
7 we discuss in the status conference, but I think they should
8 be raised while the State is here.

9 Fast is very concerned about the ambiguity that has
10 arisen relating to the plaintiffs' position on this. To be
11 candid, Fast --

12 THE COURT: About whether they consent or not?

13 MR. STIDHAM: Yes. Because Fast understands why the
14 State felt it was necessary to make this motion and we would
15 hope that the -- any ambiguity regarding who the plaintiffs
16 represent, including the folks who are not necessarily
17 named as plaintiffs in this case yet but were in initial
18 disclosures, any ambiguity regarding the waiver be addressed
19 in a very clear manner by the plaintiffs in order to address
20 the State's legitimate concerns.

21 And also, your Honor, because I think it lends itself
22 to another aspect of the relief we asked in this brief, which
23 was an order, if the Court could consider how it might be able
24 to craft an order in this case that could generally be useful
25 for subsequent requests that might arise to the State.

1 Perhaps they might go to a different agency, but if the Court
2 could give some consideration to addressing this so that that
3 exception that the State had concerns about, about prior court
4 orders, might be practical.

5 THE COURT: I looked at that. I thought that was
6 probably an efficient request.

7 On the other hand, we're dealing with a regulation,
8 and I don't know that I am able to anticipate what other
9 regulations there might be, or give advisory opinions, so I'm
10 not sure that I'm going to be able to accommodate that.

11 MR. STIDHAM: Thank you, your Honor.

12 And again, just stand by, again, addressing any
13 ambiguity, because -- about the plaintiffs' consent here,
14 because as we noted in our opposition papers, it is not CSG
15 or Fast's objective in any way to just assert that all the
16 information regarding any potential members of the putative
17 class should be subject to discovery requests without more
18 thought and care being given to it.

19 And if these individuals who are identified in the
20 initial disclosure are not currently represented by Sugar Law
21 or the Ernst & Marko firm, we need to have that clarified so
22 that we're not continuing down an area that could create more
23 concerns for the State down the road.

24 And then with regard to the meta data, your Honor, we
25 do understand that we could need some additional clarification

1 because, just like Ms. Husband, I'm not an IT professional.
2 But to add to what Mr. Rosenfeld raised that I think should be
3 a consideration given here is the meta data we're talking
4 about, based on the information that we think the State would
5 pursue here is, again, not just a question of OCR.

6 We do anticipate that there will be e-mail
7 communications, for example, your Honor, relating to internal
8 discussions about how some of these individuals were dealt
9 with, including some e-mails that might have been sent from
10 the plaintiff. And so I just want to make it clear that we
11 think that that meta data might be relevant, understanding
12 that we may not be able to get that all finished here today.

13 That's all I wanted to add, your Honor, unless you
14 have any questions.

15 THE COURT: No, I don't have any additional
16 questions.

17 Mr. Paris, you have your box checked off here. You
18 didn't file any papers with respect to this motion, but I do
19 have some questions for you.

20 MR. PARIS: Yes, your Honor.

21 THE COURT: Do you have a presentation you'd like to
22 make first?

23 MR. PARIS: Only to briefly address the issues here.
24 I only wanted to reserve in case you had any questions on
25 behalf of the plaintiffs.

1 And to address what Mr. Stidham said, I don't -- we
2 didn't mean to be ambiguous in any way. Just as we did last
3 time in your chambers, we are not only consenting to this, but
4 we hadn't been contacted by anybody. Had we --

5 THE COURT: Well, first of all, do you represent all
6 of the people disclosed in your initial disclosure?

7 MR. PARIS: Yes, your Honor. And --

8 THE COURT: Do you have a formal attorney-client
9 relationship?

10 MR. PARIS: With the named plaintiffs. With all of
11 the initial disclosure folks, some of which I have represented
12 at underlying unemployment insurance agencies, I have
13 represented probably close to 500 of those folks at the
14 underlying level, and not all of them, obviously, are listed
15 in the initial disclosures, but I or my co-counsel have some
16 type of ongoing contact with them. And specifically with the
17 named plaintiffs, two of which I represented all the way
18 through, and all of which we have some type of formal
19 understanding of what --

20 THE COURT: You have seen the request for production.

21 MR. PARIS: Yes, your Honor.

22 THE COURT: Do you represent everybody that's
23 identified in the request for production?

24 MR. PARIS: Yes, your Honor. Yes, your Honor.

25 THE COURT: In other words, do you have the authority

1 to consent, if that's what you choose to do?

2 MR. PARIS: We do have the authority to consent.

3 THE COURT: And do you intend to do that?

4 MR. PARIS: I do.

5 THE COURT: All right. Can you do that in a formal
6 way by filing some sort of document so that the State at least
7 has that to work with?

8 MR. PARIS: Yes, we can do that.

9 THE COURT: All right. Then I'll direct you to do
10 that.

11 MR. PARIS: Thank you.

12 THE COURT: Anything further, then?

13 MR. PARIS: Nothing, your Honor.

14 THE COURT: Ms. Husband, do you have any rebuttal?

15 MS. HUSBAND: No, your Honor.

16 THE COURT: Okay. I'm not going to rule from the
17 bench. I think a written decision probably would be useful.
18 It will be my intention, however, I will tell you, to grant
19 the -- or to deny the motion to compel production, except I'm
20 not at all clear about how to address the cost issue and how
21 to address mode of production.

22 So I am going to direct the defendants and counsel
23 for the moving party to confer with your IT people, if
24 necessary, to talk about perhaps a more economical way of
25 production, and that would also include a feasible way of

1 production. Maybe there is some proprietary software that the
2 State is using to store this data that makes it impossible to
3 produce it in native format that's useful in any way. I don't
4 know that. If there is, then maybe the only practical way of
5 doing it is how Ms. Husband suggested, and that is, printing
6 it off. I think you can probably avoid the second step of
7 rescanning it and redigitizing the documents. You can do that
8 yourself, if you want to do that for your own litigation
9 purposes.

10 As far as costs -- well, first of all, I also intend
11 to make an observation and a finding that the production is
12 not unduly burdensome. Frankly, the cost estimate, which
13 turns out to be half of what I thought it was, is really
14 rather modest in the case. And in terms of proportionality,
15 these are core documents and are necessary for the lawsuit
16 to be defended and most likely prosecuted.

17 Now, as far as payment in advance, I think at the
18 end of the day it's probably going to be the most sensible
19 approach to produce the documents and identify how much it
20 costs to do so. Now, I can -- if there is a real concern
21 about that, I can make an order to have the defendants escrow
22 some money so that that fund is available to pay those costs,
23 but you can have those discussions.

24 And if, Ms. Husband, you think that the State should
25 deem itself insecure, then I can address that in that fashion.

1 But once the costs are determined, then I'll address the
2 payment.

3 And as far as spreading the costs among all the
4 parties, including the plaintiff, I haven't heard from the
5 plaintiff on that. I'm a little bit reluctant to require the
6 plaintiffs to pay for copies of their own documents. On the
7 other hand, there might be an argument that says that it
8 justifies that.

9 So I suppose that means that I'm working my way
10 towards suggesting a supplemental brief on the cost issue. I
11 think you asked for that opportunity anyway because you hadn't
12 had that affidavit by the time you answered the motion itself,
13 but I think a further conversation probably will -- it might
14 obviate the need for that supplementation and clarify where
15 you stand on how much and the manner of payment and so forth.

16 Mode of production, though, is a live issue and we
17 need to get that resolved before anybody makes any effort at
18 turning documents over at this point.

19 I'll ask if there are any questions, but I would
20 remind you that I intend to address this in a written order,
21 so -- a written memorandum and opinion, so you might want to
22 wait on that.

23 But are there any questions at the moment,
24 Ms. Husband?

25 MS. HUSBAND: I just want to be clear, your Honor.

1 So the motion is denied as to all eleven at this time, is that
2 correct, not just --

3 THE COURT: Correct. Yeah.

4 MS. HUSBAND: Okay. Thank you.

5 THE COURT: We're not going to take it in phases. I
6 think as long as you're looking, you might as well look for
7 all.

8 MS. HUSBAND: I just wanted to be clear. Thank you.

9 MR. STIDHAM: I have a question, your Honor, if I
10 could, for Ms. Husband, understanding she may not be able to
11 answer it.

12 But I was hoping, Ms. Husband, do you think that
13 we could commit to having the discussions regarding mode of
14 production within the next week or so, so we can get back to
15 the Court --

16 MS. HUSBAND: Of course.

17 MR. STIDHAM: -- on whether or not we have an
18 agreement, so within a week of today?

19 THE COURT: Yeah, that's a good observation.

20 MR. STIDHAM: Thank you, your Honor.

21 THE COURT: If it's feasible, I'll direct that it
22 occur. If you need additional time, tell me how much and why.
23 Anything else?

24 MR. STIDHAM: Not from Fast, your Honor.

25 THE COURT: All right. Thank you. This matter,

1 then, Court is in recess now.

2 We do have a status conference, and you know, I think
3 we will just see if we can use Judge Cohn's jury room to do
4 that. If you want to just sit -- do you want to stay for that
5 or do you want to be excused? You may, if you wish.

6 MS. HUSBAND: Would you like me to stay for that?

7 THE COURT: It's up to you.

8 MS. HUSBAND: Then I'll probably just be excused.

9 Thank you.

10 THE COURT: Okay. All right. Actually, I'm going to
11 take a few minutes before we start the status conference, so
12 if you want to just have a discussion about logistics right
13 now, it might be a good idea. Okay?

14 MS. HUSBAND: Okay.

15 MR. ROSENFELD: Thank you, your Honor.

16 (Proceedings adjourned at 2:54 p.m.)

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19 CERTIFICATE OF COURT REPORTER

20

21 I certify that the foregoing is a correct transcript
22 from the record of proceedings in the above-entitled matter.

23

24 s/ Rene L. Twedt
25 RENE L. TWEDT, CSR-2907, RDR, CRR, CRC
Federal Official Court Reporter

June 24, 2019
Date